Supreme Court, U.S.
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No. 03-031280

IN THE

Supreme Court of the United States

GEORGE E. WARREN CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should overrule *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), applied below as binding authority, in which the Federal Circuit held that refund, or "drawback," of duties, taxes and fees imposed on merchandise "because of . . . importation" — which Congress broadly intended to place United States exporters on an equal footing with foreign competitors by refunding sums paid on imports — is restricted to duties, taxes and fees imposed *discriminatorily* on imports.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

George E. Warren Corporation was the plaintiff-appellant below. The United States of America was the defendant-appellee below.

RULE 29.6 STATEMENT

George E. Warren Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

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George E. Warren Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a - 18a) is reported at 341 F.3d 1348. The opinion of the United States Court of International Trade (Pet. App. 19a - 34a) is reported at 201 F. Supp. 2d 1366.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on August 28, 2003 and denied a timely petition for panel rehearing and rehearing en banc on November 6, 2003 (Pet. App. 35a). On January 21, 2004, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved, 19 U.S.C. §§ 1313(j) and (p), 26 U.S.C. §§ 4461 and 4462, and 26 U.S.C. §§ 4611 and 4612, are reproduced in the appendix (Pet. App. 36a - 56a).

STATEMENT OF THE CASE

1. Petitioner George E. Warren Corporation ("Warren") imported finished petroleum products, specifically, gasoline and motor fuel blending stock, in three customs entries in December 1995 and January 1996. Warren paid the Harbor Maintenance Tax ("HMT") imposed under 26 U.S.C. §§ 4461 and 4462 on all three entries, and the Environmental Tax ("ET") imposed under 26 U.S.C. § 4611, *et seq.* on two of the entries.

In 1996, Warren exported other petroleum products that were commercially interchangeable with the petroleum products originally imported and, pursuant to 19 U.S.C. §§ 1313(j) and (p), filed claims for drawback of charges paid upon the original importations. Section 1313(j)(1) provides for the payment of drawback — *i.e.*, a refund of 99% of the amount paid upon the entry of imported merchandise — of any duty, tax or fee imposed under federal law "because of its importation" when the same or commercially interchangeable merchandise is exported or destroyed under Customs' supervision within three years of the importation. Section 1313(p) specifically covers drawback claims in connection with substitution of finished petroleum derivatives. Warren's drawback claims satisfied all of the substantive provisions of 19 U.S.C. §§ 1313(j) and (p).

The United States Customs Service, now known as the United States Bureau of Customs and Border Protection ("Customs"), processed the drawback entries and, pursuant to 19 U.S.C. §§ 1313(j) and (p), granted drawback of 99% of the customs duties that Warren paid upon its importation of the petroleum products. Customs did not, however, pay drawback of the HMT and ET, and Warren filed

administrative protests with Customs challenging Customs' failure to do so. Customs denied Warren's protests, which Warren then challenged by filing a summons in the United States Court of International Trade ("CIT").

2. The CIT held that Warren's claims for drawback of HMT were precluded by the Federal Circuit's decision in *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999). In *Texport*, the Federal Circuit held the HMT is not eligible for drawback as a charge imposed "because of . . . importation" because it is not imposed in a discriminatory fashion against imports, but rather is "a generalized Federal charge for the use of certain harbors. It is intended to be assessed independently of whether the 'port use' is for imports, exports, or other shipments." *Id.* at 1296-97 (citation omitted).

The Federal Circuit derived the "discrimination" requirement in *Texport* based upon the following reasoning:

> [T]he dispositive question is whether the HMT is assessed "because of . . . importation." 19 U.S.C. § 1313(j)(2). This language, we think, is best read as limiting the scope of the charges eligible for drawback to only those with a substantial nexus to the importation of merchandise. We thus read the "because of . . . importation" clause to require a nexus between the assessed charges and the act of importation, and therefore preclude the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports. The purpose of drawback is to place those who export from the United States on an equal footing with overseas

> competitors, by largely refunding the sums paid to import certain materials, thus eliminating or diminishing the cost disadvantage resulting from the presence of import duties, taxes, or fees. This purpose does not require the refund of generalized Federal charges; we do not think Congress intended section 1313(j)(2) to grant a broad tax break to exporters.

185 F.3d at 1296-97.

The CIT observed that "the Federal Circuit's holding in *Texport* that the HMT is not subject to drawback is . . . controlling," and thus rejected Warren's position that the HMT imposed on imports has the requisite nexus to the act of importation because it is assessed on imported goods while they are still in Customs' custody. Pet. App. 30a. As to the ET, the CIT concluded:

> [T]he ET is a generalized charge assessed against all petroleum products, which is imposed on domestic products prior to refinement and imported petroleum products regardless of their level of refinement at the time they are entered. Since the ET is imposed in a nondiscriminatory manner on both imported and domestic petroleum products, the Court concludes that, like the HMT, it does not have "the necessary nexus to importation to qualify it for drawback under [19 U.S.C. §] 1313(j)(2)."

Pet. App. 34a (quoting *Texport*, 185 F.3d at 1297).

3. The Federal Circuit affirmed the CIT's decision, stating: "Under *Texport*, Warren's claim for [drawback of] HMT is absolutely foreclosed. Nor has Warren shown any error in the trial court's application of the *Texport* rule to the protest claim for drawback of ETs. We hold simply: like the HMT, the ET is not imposed on cargo 'because of . . . importation.'" Pet. App. 17a – 18a.

In response to Warren's argument that the legislative history of 19 U.S.C. § 1313(j) is replete with references indicating that Congress intended the phrase "because . . . of importation" simply to require that taxes and fees must attach while imported goods are in Customs' custody — as is the case with both the HMT and ET imposed on imported petroleum products — the Federal Circuit stated that *Texport's* understanding of the "because of . . . importation" language in § 1313(j)(2) was "derived from the plain language of the provision itself." Pet. App. 9a (citing *Texport*, 185 F.3d at 1296-97). Therefore, the panel concluded that "[a]ny conflicting indications in the legislative history cannot be dispositive." Pet. App. 10a (citing *Van Wersch v. Dep't of Health & Human Servs.*, 197 F.3d 1144, 1152 (Fed. Cir. 1999) (explaining that where language in a statute is "crystal clear," legislative history cannot "trump the irrefutably plain language that emerged when Congress actually took pen to paper")).

4. The Federal Circuit denied Warren's petition for panel rehearing and rehearing en banc (Pet. App. 35a) and this petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Federal Circuit's denial of drawback of nondiscriminatory taxes on imports eliminates benefits Congress intended to confer on exporters under the drawback laws. Contrary to the Federal Circuit's reasoning, the statutory phrase "because of . . . importation" does not require that a tax be imposed discriminatorily on imports to qualify for drawback. The Federal Circuit failed to ascertain the Congressional intent behind that phrase, which was meant only to require that taxes be imposed on imported goods while they are in Customs' custody, and instead substituted its own judgment for that of Congress. The Federal Circuit's standard places U.S. exporters at a distinct economic disadvantage in foreign markets and frustrates Congress' intent to ensure that those who export from the United States can compete on an equal footing with foreign competitors. The Court should grant certiorari in order to ensure that this central purpose of the drawback laws is fulfilled.

I. *Texport* Recognized the Ambiguity in the Drawback Statute But Failed to Consult the Legislative History.

In the proceedings below, the Federal Circuit dismissed the significance of the legislative history of 19 U.S.C. § 1313(j) on the proffered ground that *Texport* "analy[zed] . . . the plain meaning of the text of § 1313(j)(2)" and, therefore, "[a]ny conflicting indications in the legislative history cannot be dispositive." Pet. App. 10a (citing *Van Wersch v. Dept. of Health and Human Services*, 197 F.3d 1144, 1152 (Fed. Cir. 1999)). Although, as the Federal Circuit noted, legislative history cannot trump "crystal clear" or "irrefutably plain" statutory language, *id.*, the "because of . . . importation" language in § 1313(j)(2) is far from "crystal clear" or "irrefutably plain."

The *Texport* decision itself confirms that instead of finding the phrase "because of . . . importation" to be straightforward, the panel found it to be susceptible to more than one reading. The court stated:

> *This language, we think, is best read* as limiting the scope of the charges eligible for drawback to only those with a substantial nexus to the importation of merchandise. *We thus read* the "because of . . . importation" clause to require a nexus between the assessed charges and the act of importation, and therefore preclude the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports.

Texport, 185 F.3d at 1296 (emphasis added). Thus, the *Texport* panel reached its decision based on the following *inferences* that it drew from the statutory language: first, that the phrase "because of . . . importation" requires a "substantial nexus" between the charge and the act of importation, and second, and more importantly, that the required nexus is satisfied only if a duty, tax or fee is assessed in a nondiscriminatory fashion against all shipments utilizing ports — a requirement that exists nowhere in the plain language of 19 U.S.C. § 1313(j)(2).

The *Texport* court, in a further indication that the meaning of the phrase "because of . . . importation" was not ascertained from the plain meaning of the statutory language, went to significant lengths in an attempt to ground its interpretation within the overall purpose of the drawback statute. The court noted:

> The purpose of drawback is to place those who export from the United States on an equal footing with overseas competitors, by largely refunding

> the sums paid to import certain materials, thus eliminating or diminishing the cost disadvantage resulting from the presence of import duties, taxes, or fees. This purpose does not require the refund of generalized Federal charges; we do not think Congress intended section 1313(j)(2) to grant a broad tax break to exporters.

Texport, 185 F.3d at 1296-97. Although *Texport* thus recognized the importance of Congressional intent in interpreting the "because of . . . importation" requirement, it failed to ascertain that intent by consulting the pertinent legislative history. In fact, the court cited legislative history only to interpret a *different phrase* in § 1313(j)(2), which requires that the imported and exported goods be "commercially interchangeable." *Id.* at 1295. Thus, legislative history that sheds light on what Congress intended when it included the "because of . . . importation" requirement in the statute went unexamined in *Texport*.

II. The Legislative History of 19 U.S.C. § 1313(j) Shows that, Contrary to *Texport*, Congress Intended that Provision to Apply to Duties, Taxes and Fees Imposed on Imported Goods While in Customs' Custody.

In view of the statutory ambiguity implicitly recognized in *Texport*, and the Federal Circuit's failure in that case to examine the pertinent legislative history when it formulated the "discrimination" requirement, the court of appeals erred in the proceedings below by giving short shrift to the legislative history of the provisions involved. That legislative history is replete with statements showing that Congress intended simply to apply drawback to those duties, taxes and fees that are imposed upon importation, *i.e.*, that attach while

imported goods are in Customs' custody. At the same time, the legislative history confirms that there is absolutely no support for *Texport*'s proposition that only discriminatory taxes and fees are eligible for drawback.

Thus, in enacting 19 U.S.C. § 1313(j)[1] (now § 1313(j)(1)), which contains the identical "because of . . . importation" language as subsection (j)(2), Congress stated:

> Under present law, unless provision is expressly made for drawback (refund) of duties, taxes, or fees *paid on imported articles released from Government custody*, a refund of the payment to the Government is not allowed on the destruction or exportation of imported goods.

S. Rep. No. 96-999, at 23 (1980) (emphasis added). Congress thus recognized that importers who re-exported same condition merchandise were paying non-refundable duties, taxes and fees on their imports, and rectified this situation by broadly providing for drawback of *all* duties, taxes or fees imposed on imported goods prior to their release from Customs' custody. Congress signaled no intention to restrict drawback to duties, taxes and fees that are imposed discriminatorily on imported goods.

---

1. Warren claimed drawback under 19 U.S.C. §§ 1313(j) and (p). Under retroactive amendments enacted in 1999, petroleum drawback under § 1313(p) "shall not exceed the amount of drawback that would be attributable to the article . . . had the claim qualified for drawback under subsection (j)." 19 U.S.C. § 1313(p)(4)(B) (1999). Therefore, as both the trial and appellate courts recognized, § 1313(p) drawback includes any "duty, tax, or fee" eligible for drawback under § 1313(j).

The identical conclusion must be drawn from the legislative history of 19 U.S.C. § 1313(j)(2), which began as a bill providing drawback of duties, taxes and fees on packaging material and later was amended to provide drawback of duties, taxes and fees on all goods. This legislative history confirms that drawback is available, without limitation, for duties, taxes and fees imposed while goods are in Customs' custody. A Senate Report to the bill stated:

> *Current law.*—In general, drawback is a refund of duties, fees, or taxes *paid upon imported articles*, including dumping, countervailing, and marking duties paid.
>
> * * *
>
> *The bill.*—Section 201 would amend section 313 of the Tariff Act of 1930 (19 U.S.C. 1313) to authorize the payment of drawback on packaging material imported for use in performing incidental operations regarding the packaging or repackaging of imported merchandise on which same condition drawback may be paid. Thus, 99 percent of any duties, taxes, or fees which had been *paid upon the importation* of such packaging materials would be refunded where the materials are exported in the same condition as when imported . . .

S. Rep. No. 98-308, at 28-29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 4937-38 (emphasis added).

The House Report to the bill similarly stated:

> Section 201 would amend section 313(j) of the Tariff Act of 1930 (19 U.S.C. 1313(j)) by inserting a new paragraph which would provide that 99% of the duty, tax or fee *paid on certain imported merchandise* shall be refunded as drawback. . . . Further, in no case may the refunded duty under this or any other section of law, exceed 99 percent of the duties *paid on the imported merchandise*.

H.R. Rep. No. 98-1015, at 64 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4960, 5023 (emphasis added).

Thus, the legislative history confirms that Congress broadly intended to allow drawback of duties, taxes and fees paid "on imported articles released from Government custody" (S. Rep. No. 96-999); "upon imported articles" (S. Rep. No. 98-308); and "on the imported merchandise" (H.R. Rep. No. 98-1015). There is no indication anywhere in the statute or the legislative history that Congress intended to restrict drawback under 19 U.S.C. § 1313(j) to duties, taxes and fees that discriminate against imports, while there is ample confirmation in the legislative history that Congress intended the provision to provide for refunds of all duties, taxes and fees assessed on imported goods so long as they are imposed while the goods are in Customs' custody.

The Federal Circuit conceded that the legislative history might be contrary to *Texport*'s interpretation of the "because of . . . importation" requirement, but concluded that it "[did] not justify reassessing [*Texport*]" because it "at most lend[s] support to an alternate interpretation." Pet. App. 10a. In this vein, the court of appeals acknowledged that it "may be so"

that, "'[h]ad Congress intended to limit drawback to duties, taxes and fees imposed discriminatorily on imports, there would have been some evidence of that intent in the legislative history. . . .'" Pet. App. 10a (quoting Warren's brief). The Federal Circuit, however, dismissed the significance of Congress' silence as to any discrimination requirement on the ground that the opposite conclusion "is equally possible." Pet. App. 10a.

Thus, the Federal Circuit's decision placed Warren in the classic quandary of having to prove a negative, by which Warren could prevail only if it could point to a non-existent statement in the legislative history that discrimination against imports was *not required*. Such a standard is impossible to meet and renders the legislative history virtually meaningless. This Court should grant certiorari in this case to reconsider *Texport's* interpretation of the "because of . . . importation" language in § 1313(j)(2) in light of the pertinent legislative history, which confirms that *Texport* was decided incorrectly.

III. *Texport* Undermines the Purpose of the Drawback Laws, which are Intended to Place United States Exporters on an Equal Footing with their Foreign Competitors by Refunding Import Duties, Taxes and Fees.

Texport was correct in one respect — that drawback of duties, taxes and fees is intended to "place those who export from the United States on an equal footing with overseas competitors, by largely refunding the sums paid to import certain materials, thus eliminating or diminishing the cost disadvantage resulting from the presence of import duties, taxes, or fees." 185 F.3d at 1296-97. Over a century ago, in connection with a statute providing for drawback on articles

"wholly manufactured" from imported materials, this Court similarly stated:

> The object of the section was evidently not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries. In determining whether the articles in question were wholly manufactured in the United States, this object should be borne steadily in mind.

Tide Water Oil Co. v. United States, 171 U.S. 210, 216 (1898).

Thus, the object of drawback — to place U.S. exporters on an equal footing with overseas competitors by eliminating cost disadvantages through a refund of sums paid to import materials — likewise "should be borne steadily in mind," *id.*, in determining whether the HMT and ET were imposed "because of . . . importation" as required by 19 U.S.C. § 1313(j). The legislative history to § 1313(j) specifically indicates that it was Congress' intent to eliminate the cost disadvantages associated with import duties, taxes or fees. As explained in H.R. Rep. No. 96-1109:

> Under present drawback provisions, if a firm imports merchandise for anything other than manufacture of [sic] production, and wants to export the merchandise without absorbing the duty cost, he must resort to one of several customs

> procedures such as temporary importation bonds, customs bonded warehouses, or foreign trade zones.
>
> During the Subcommittee on Trade's hearings it was stated that there are a number of problems with using these alternative procedures instead of drawback. For example, a U.S. firm must know, at the time of importation, exactly where it intends to sell the goods and what it intends to do with the goods. These procedures entail other restrictions on what a firm can do to meet the needs of its foreign and domestic customers.
>
> Section 201 [enacting § 1313(j)] would give U.S. firms more flexibility in meeting customer demands, without having to pay non-refundable duties on merchandise that is not used in the United States. Thus, exporters would receive drawback in those instances in which the merchandise imported was not used and they were unable to anticipate the need to export.

H.R. Rep. No. 96-1109, at 17 (1980).

The Federal Circuit concluded in *Texport* that the purpose of drawback "does not require the refund of generalized Federal charges; we do not think Congress intended section 1313(j)(2) to grant a broad tax break to exporters." 185 F.3d at 1297. The court of appeals' concern is misplaced. There is no danger that permitting drawback of nondiscriminatory taxes and fees will result in an unintended windfall to exporters. The refund of such assessments would be strictly limited to those amounts imposed on imported goods while

in Customs' custody, thereby excluding the broad range of taxes that fall either on (i) imported goods after they are released from Customs' custody, and thereafter exported, or (ii) domestic goods that are exported.

Nondiscriminatory import taxes and fees pose no less a cost burden on exporters than do taxes and fees that are imposed solely on imports. The undisputed purpose of drawback is therefore advanced by providing drawback of taxes and fees imposed on imported goods while in Customs' custody, even if they are also applied to non-import transactions. *Texport's* restriction of drawback to only those assessments that fall discriminatorily on imports actually works *counter* to the purpose of drawback, for it impedes the ability of exporters who pay nondiscriminatory taxes on imported goods to compete with foreign producers in the world market.

Under *Texport's* restrictive interpretation, Congress would have conferred a drawback benefit on a *non-existent* class of taxes and fees, because at the time §§ 1313(j)(1) and (2) were enacted, no taxes or fees were imposed discriminatorily on imports. This anomaly is particularly striking given Congress' expressed intent in enacting § 1313(j) to specifically give U.S. companies more flexibility to export merchandise without absorbing import costs. *See* H.R. Rep. No. 96-1109, at 17. The Federal Circuit's reading of the statute must therefore be rejected. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"); *see also*, *Witco Chem. Corp. v. United States*, 742 F.2d 615, 619 (Fed. Cir. 1984) ("[A]n absurd construction of the statutory provision should be avoided. . . . We therefore favor the interpretation that produces the more rational results . . .").

The Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade, which, in turn, has exclusive jurisdiction over challenges to Customs' denial of drawback claims. No other court of appeals will have an opportunity to address the important issue presented by this case. This Court should therefore grant certiorari to remedy the Federal Circuit's restrictive interpretation of the "because of . . . importation language" in order to ensure that the vitally important purpose of drawback — to place United States exporters on an equal footing with their foreign competitors by refunding duties, taxes and fees paid on imported materials — is advanced, not impeded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED AUGUST 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1467

GEORGE E. WARREN CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Before MICHEL, SCHALL, and PROST, Circuit Judges.

OPINION

MICHEL, Circuit Judge.

Plaintiff-Appellant George E. Warren Corporation ("Warren") appeals the decision of the United States Court of International Trade granting summary judgment to the government in this civil action contesting the denial of Warren's protest. The court held that Harbor Maintenance Taxes ("HMTs") and Environmental Taxes ("ETs") paid by Warren on various imported petroleum products were

ineligible for drawback refunds. *George E. Warren Corp. v. United States*, 201 F. Supp. 2d 1366 (CIT 2002). Despite the government's argument about prematurity and failure to exhaust administrative remedies, we hold the Court of International Trade did have jurisdiction, because the action contested denial of a protest concerning drawback for the two taxes. Further, the doctrine of futility excused further resort to administrative remedies. Because *Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999), held HMTs are not imposed "because of . . . importation," as is required for drawback by 19 U.S.C. § 1313, we affirm as to that tax. Applying to the ETs the principle of *Texport* that to be eligible for drawback a tax must discriminate against imports as compared to exports or domestic shipments, we hold them also not based on importation because these taxes apply equally to both domestic and imported petroleum products. We therefore affirm as to them as well.

BACKGROUND

Warren imported petroleum products on three different occasions from December 1995 to January 1996, paying regular customs duties and HMT on each occasion, and also paying ET on two of the three occasions. Subsequently, Warren exported petroleum products that were "commercially interchangeable" with the imported merchandise, a statutory prerequisite for "drawback" refunds. Based on the exportation, on July 15, 1996, Warren submitted drawback claims to the United States Customs Service ("Customs") requesting refund of the charges paid. On October 4, 1996, Customs "liquidated" the drawback entries and allowed a 99% drawback refund of the "Column 1 customs duties"

pursuant to 19 U.S.C. § 1313(p). On January 3, 1997, Warren protested Customs' decision "to refuse to grant drawback of the HMT and ET paid in connection with the imported merchandise" and on February 26, 1997, Customs denied Warren's protest on the merits.

Warren then filed an action with the Court of International Trade. The government argued that the Court of International Trade lacked jurisdiction because it only has jurisdiction under 28 U.S.C. § 1581(a) where a valid protest has been denied. The government maintained that Warren did not have grounds to file a protest since its original drawback request did not include HMTs or ETs and was granted as to regular duties, the only subject of the request. The government argued that, accordingly, there was no *valid* protest. The Court of International Trade, however, held that it did have jurisdiction because Customs' denial of the protest specifying the two taxes was made on the merits and it would thus have been futile for Warren to file a second drawback request specifying HMT and ET. *Warren*, at 1373. Although the two taxes were omitted from the original request for drawback, they were clearly raised in the protest and that was enough. *Id.* According to the court, Warren did not need to further exhaust administrative remedies and thus there was an actual controversy ripe for judicial review. *Id.* at 1373.

Warren moved for summary judgment. The Court of International Trade then treated the government's arguments about the lack of merit of Warren's refund action as a cross motion for summary judgment and granted it. *Id.* at 1369. The court held that Warren's claims for drawback of HMTs

and ETs were precluded by *Texport*. *Id.* With respect to the HMT, the court rejected Warren's argument that liability for HMT has the required "substantial nexus" to the act of importation simply because it has a nexus to the act of exportation for purposes of the Export Clause of the United States Constitution, citing *Texport*'s specific holding that HMTs were not eligible for drawback. *Id.* at 1378. Finally, the court also concluded that Warren's argument that the HMT should be deemed a duty instead of a tax for drawback purposes was irrelevant as the "because of . . . importation" requirement of 19 U.S.C. § 1313(j) applies equally to taxes and duties and therefore whether HMTs are considered taxes or duties does not matter. *Id.* at 1372, n.6.

For the ET, the trial court concluded that the ET is "a generalized charge assessed against all petroleum products, which is imposed on products prior to refinement and imported petroleum products regardless of their level of refinement at the time they are entered." *Id.* at 1374. Because of this conclusion, the trial court reasoned that ETs are "imposed in a nondiscriminatory manner on both imported and domestic petroleum products" and therefore do not have the necessary nexus to importation to qualify for drawback according to *Texport*. *Id.* at 1374.

Warren timely appealed the Court of International Trade's decision to this court. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5). Based on the sound reasoning of the trial court's careful opinion, we affirm.

Appendix A

DISCUSSION

It is not disputed by either party but we note that summary judgment is appropriate where the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CIT R. 56(c). Statutory interpretation is a matter of law that we review de novo. *Lynteq, Inc. v. United States*, 976 F.2d 693, 696 (Fed. Cir. 1992).

I. Jurisdiction

The government again argues that the Court of International Trade lacked jurisdiction because Warren did not contest the denial of a *valid* protest. The government asserts the protest was invalid because Warren did not request drawback of HMTs or ETs. The government argues that there was, therefore, no "refusal to pay" on the part of Customs. In effect, the government argues that drawback claims cannot first be raised in a protest. The government also maintains that it would not have been futile for Warren to submit its drawback request for the HMTs and ETs and that Warren could belatedly have submitted such claims much later because amendments to the pertinent drawback statute provided a window of six months in 1999 in which Warren could have submitted such a request for drawback. According to the government, Warren did not exhaust its administrative remedies, which the government asserts is a prerequisite to Court of International Trade jurisdiction. We disagree.

Appendix A

The jurisdictional provision relied on by the Court of International Trade and Warren reads:

> § 1581. Civil actions against the United States and agencies and officers thereof
>
> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515].

28 U.S.C. § 1581(a) (2000). Because the provision as worded requires only the denial of a protest to establish Court of International Trade jurisdiction, Customs' denial of Warren's protest on the merits is sufficient. The government cites no precedent refuting the trial court's commonsense reading of § 1581(a) or the logical link between futility — Warren knew that Customs would not refund HMTs and ETs because Customs already clearly denied Warren's claims for such drawback, albeit in the context of a protest — and the sufficiency of a denial of a protest for purposes of jurisdiction. That Warren *could* have filed new, independent requests for drawback of HMTs and ETs because of an extended time-window does not mean that it had to do so despite Customs having already ruled on the merits. When the government argues that a new filing by Warren would not have been futile, it confuses administrative futility with time bars. Futility occurs where the filing party already knows that the agency would deny its claim because the agency has already done so. Parties are not required to perform useless acts to exhaust administrative remedies. See *Thomson Consumer Elecs., Inc. v. United States*, 247 F.3d 1210, 1212, 1214-15 (Fed. Cir.

2001) (explaining generally the purpose of requiring exhaustion of administrative remedies and holding specifically that a protest is not required for the Court of International Trade to have jurisdiction over civil refund actions in which a protest to Customs would be futile because of Customs' lack of authority over the subject matter).

We, thus, hold that the Court of International Trade correctly concluded that under § 1581(a) it had jurisdiction over Warren's civil action contesting Customs' denial of Warren's protest.

II. Harbor Maintenance Tax

Without doubt the Court of International Trade correctly interpreted *Texport* as ruling HMTs ineligible for drawback under 19 U.S.C. § 1313(j)(2); indeed that is the decision's express holding. Warren argues, however, that *Texport* was incorrectly decided because it is inconsistent with certain legislative history. In the alternative, Warren maintains that under a correct construction of 19 U.S.C. § 1313(j)(2), HMT and ET qualify for drawback because, Warren asserts, both are in fact imposed "because of importation."

We cannot simply overrule the *Texport* decision, even if we were persuaded (which we are not) that it is appropriate; to overrule a precedent, the court must rule en banc. See *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) ("This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc."). We assume that pursuant to Federal Circuit Rule 35 Warren

seeks to persuade us to solicit the full court's consideration of this appeal (and an en banc decision overruling *Texport*).[1] No petition for rehearing or rehearing en banc was filed by the plaintiff in *Texport* so it is perhaps unsurprising that Warren's brief and that of the amicus, BP Oil Supply Company, Inc., focus mainly on reasons for this court to overturn the holding of *Texport* in a way normally reserved for petitions for en banc rehearing. We will, therefore, examine Warren's arguments for overruling *Texport* to explain why we do not think an initial en banc hearing of this appeal is justified.

A.

Broadly stated, Warren's primary argument is that the phrase "any duty, tax, or fee imposed under Federal law because of . . . importation" necessarily means any duties, taxes, or fees "that attach while the goods are in Customs' custody," and not as *Texport* held, ones that are imposed

1. Rule 35 states, inter alia, that counsel petitioning for initial hearing en banc must certify that the appeal "requires an answer to one or more precedent-setting questions of exceptional importance." Fed. Cir. R. 35(b)(1) (2003). Thus, hearing en banc, although rarely granted, may be appropriate where (1) the court must answer a question of exceptional importance and (2) the answer will create a precedent. We do not believe that this appeal, seeking to overturn *Texport*, fulfills either condition. *Texport*, a recent (1999), unanimous decision, in which the losing party did not even seek en banc rehearing, has already decided the question presented here. Even assuming it were precedent-setting and of exceptional importance, we are not persuaded that the question warrants en banc consideration, given the weakness of Warren's arguments against *Texport*.

discriminatorily on imported merchandise. As explained in *Texport*, § 1313(j)(2) requires that for charges to be eligible for drawback they must be (1) any duty, tax, or fee assessed under Federal law, and (2) assessed because of a good's importation.[2] *Texport*, 185 F.3d at 1296. The *Texport* opinion concludes that the first requirement is clearly satisfied for the HMT, but that the second must be analyzed in detail. *Id.* The *Texport* analysis then concludes that the "because of . . . importation" requirement limits the scope of charges eligible for drawback to those with "a substantial nexus to the importation of merchandise," and that § 1313(j)(2) therefore precludes "the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports." *Id.* This understanding of the limitation imposed in § 1313(j)(2) is derived from the plain language of the provision itself. *Id.* at 1296-97. Because the phrase "because of . . . importation" modifies the words "any duty, tax, or fee imposed under Federal law," all duties, taxes, or fees *not* assessed because of importation fall outside of that provision. The language thus establishes two categories

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2. Section 1313(j) provides:

> if there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation . . . [substitute merchandise that is exported or destroyed (under certain enumerated conditions),] . . . the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback . . . [up to 99% of the amount paid].

19 U.S.C. § 1313(j)(2) (2000).

of duties, taxes, and fees, one subject to drawback, and the other not. *Texport*'s specific holding was: because the HMT is a generalized federal charge for *all* uses of certain harbors, it does not discriminate among exports, domestic shipments, and imports. Therefore it does not have the necessary nexus to importation of goods to qualify for drawback refunds under § 1313(j)(2). *Id.* at 1297. In view of the persuasive reason of *Texport*, we reject Warren's statutory interpretation argument as unconvincing.

Warren also argues that the *Texport* decision was contrary to the legislative intent as reflected in certain portions of the legislative history. We see no flaw in *Texport*'s analysis of the plain meaning of the text of § 1313(j)(2). Any conflicting indications in the legislative history cannot be dispositive. See, *e.g.*, *Van Wersch v. Dep't of Health & Human Servs.*, 197 F.3d 1144, 1152 (Fed. Cir. 1999) ("[The language of the statute] is crystal clear. Under these circumstances, we are not prepared to allow the extant legislative history, which we have described above, to trump the irrefutably plain language that emerged when Congress actually took pen to paper."). Furthermore, because many of Warren's arguments about legislative intent are based on its interpretation not of Congress' language but of omissions, they do not show error in *Texport*, but at most lend support to an alternate interpretation. That does not justify reassessing this precedent, en banc. For example, Warren argues "had Congress intended to limit drawback to duties, taxes and fees imposed discriminatorily on imports, there would have been some evidence of that intent in the legislative history. . . ." That may be so, but not necessarily; the opposite is equally possible.

The argument is simply too speculative. Thus, we would not urge the full court to hear this appeal.

B.

Warren's second principal argument for drawback of HMTs ignores *Texport* and focuses instead on decisions characterizing the HMT in certain contexts as a customs duty, as opposed to a tax. For example, Warren cites to *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002), and emphasizes the court's holding that a statutory provision, 28 U.S.C. § 2411, providing for interest on tax refund judgments does not apply to HMT refunds because 28 U.S.C. § 2411 is not a customs law. Warren also cites a subsection of the HMT statute, 26 U.S.C. § 4462(f)(1), which provides that "except to the extent otherwise provided in regulations," all administrative and enforcement provisions of customs laws and regulations apply to the HMT "as if such tax were a customs duty." Warren argues that because the HMT is treated as if it were a customs duty for such purposes, then, ipso facto, HMT must be subject to the customs laws that govern drawback of duties. Thus, Warren baldly asserts that because the HMT is treated as if it were a duty, it is either not subject to the "because of . . . importation" requirement in § 1313(j)(2), or it is by definition "because of . . . importation."

Warren's arguments are unconvincing. First, it is far from clear that simply because 26 U.S.C. § 4462(f)(1) specifies that HMT is treated as if a duty for the administrative and enforcement provisions of Customs' laws and regulations, it must also be so treated for drawback purposes. The Harbor

Maintenance *Tax* is still titled "Tax" and drawback does not fall under the categories of Customs' administration or enforcement, but instead under the category of importers' statutory entitlement.[3] Second, and more importantly, even if the HMT were in every way a duty, § 1313(j)(2) does not suggest that duties are treated differently from taxes. That section actually provides identical treatment for "any *duty*, tax, or fee." 19 U.S.C. § 1313(j)(2) (emphasis added). Nor does any cited authority suggest that once a charge is treated as if a duty for any purpose, the "because of . . . importation" requirement is somehow automatically satisfied simply as a result of such designation. Nor do we find the argument logical. Thus, we see no convincing reason for en banc hearing.

C.

Finally, Warren argues that even under the *Texport* test, the HMTs qualify for drawback; *i.e.*, Warren purports to meet *Texport*'s test while avoiding its express holding that HMTs are ineligible for drawback refunds. Warren equates discriminating between imports and non-imports with imposing charges on goods while in Customs' custody by

3. Similarly, in contrast to Warren's arguments, just because the statutory provision imposing the merchandise processing fee ("MPF"), 19 U.S.C. § 58c(g)(2) , provides that the MPF must be treated as a duty for all administrative and enforcement purposes "other than drawback," it does not mean that the parallel language in the HMT statute which leaves out an "other than drawback" clause must mean that the tax should be treated as a duty for purposes of drawback. Warren again reads too much into an omission by Congress.

noting that it is during Customs' custody that "Column 1 duties," which are clearly eligible for drawback, are imposed. Warren's logic is faulty. The collection method alone does not show discrimination as defined by *Texport*. Specifically, we do not agree that a difference in collection method, agency, or timing shows a difference that amounts to discrimination adequate to establish the nexus *Texport* requires between the tax and importation. Again, Warren fails to recognize that any arguable error does not warrant an en banc hearing.

III. Environmental Taxes

As to the claims for drawback of the ETs, Warren argues that even if the rationale of *Texport* were applicable, the ET does in fact discriminate against imports. Warren's position is that "the [ETs] 'entered for consumption, use or warehousing' language [from 26 U.S.C. § 4611(a)(2)] simply denotes imported merchandise, and that the requisite nexus exists between the ET and importation because the ET statute clearly imposes the tax on the *physical entry*, *i.e.*, the importation, of petroleum products into the United States." (Emphasis in original.)

While Warren is correct that the language in § 4611(a)(2) covers *imported* petroleum products, § 4611(a) as a whole clearly covers *all* petroleum products, whether imported or created domestically. Section 4611(a), in pertinent part, provides:

> General rule. There is hereby imposed a tax at the rate specified in subsection (c) on —

> (1) crude oil received at a United States refinery, and
>
> (2) petroleum products entered into the United States for consumption, use, or warehousing.

26 U.S.C. § 4611(a) (2000). Thus, § 4611(a) functions much as does the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901-2911 (2000), in that the Beef Act taxes domestic *cattle* upon their sale but taxes imported beef *products* upon their entry into the country. See generally *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375 (Fed. Cir. July 11, 2003). The analogy shows that domestic commodities can frequently be taxed at a raw or early stage of their processing, long before they have reached the form desired by their ultimate consumers. Early taxation is indeed preferable because it is more comprehensive and efficient — a whole animal can be taxed at once, so the need to account for its many parts is avoided, as are gaps or repeats in taxation. Imported commodities, however, typically have to be taxed after all processing or at intermediate stages of processing, even though this is not optimal, because in their raw form they are beyond the reach of taxation, *i.e.*, the United States clearly has no authority to tax goods produced and possessed outside the country, even if it could distinguish which crude oil (or which cattle) is ultimately bound for the United States. Thus, imported products are taxed "downstream" in their processing and domestic products in original form. But downstream taxation is not equivalent to discriminatory taxation.

Only if additional products were taxed, or higher rates applied to imported products, would there be any meaningful distinction between the treatment of imported and domestic goods and hence discrimination against imported products. While the ET collection method and agents differ for imports and domestic products, Warren makes no suggestion that the objective or result is to tax the two any differently in terms of scope or rates. The rate of taxation for both the domestic crude oil and the imported petroleum products is the same because subsection (c) applies a uniform rate to both. The sequential listing of domestic and imported products in subsections (1) and (2) of § 4611(a), thus, shows only that goods with different origins require different collection methods.

Nor are "petroleum products" a broader class than crude oil. Rather, they are identical in scope. The trial court quotes an excerpt from one of the government's briefs submitted to it that explains:

> Pursuant to 26 U.S.C. § 4611(a) & (b), ETs are imposed on domestic crude oil received at U.S. refineries, on petroleum products imported into the United States, and on domestic crude oil used in the United States or exported, provided the tax had not been imposed previously. The term "crude oil" includes crude oil condensates and natural gasoline. 26 U.S.C. § 4612(a)(1). The term "petroleum product" includes crude oil. Id. § 4612(a)(3). The legislative history to these statutory provisions further explains that the oil subject to tax is "crude oil, including crude oil

> condensate and natural gasoline" and that "petroleum products" include crude oil, crude oil condensate, natural and refined gasoline, refined and residual oil, and any other hydrocarbon product derived from crude oil or natural gasoline . . ." H.R. Rep. No. 96-1016, pt 2, at 4 (1980), reprinted in 1980 U.S.C.C.A.N. 6151 (emphasis added).
>
> Thus, contrary to Warren's claim that the ET leaves domestic petroleum products untaxed, the legislature recognized that domestic petroleum products would be "derived from crude oil or natural gasoline" that were [sic] already separately taxed. This reading of the legislative intent is further consistent with 26 U.S.C. § 4612(b), which assures that taxes are imposed only once on any petroleum product. See H.R. Rep. No. 96-1016, pt 2, at 5.

Warren, at 1374 (quoting Defendant's Reply to Plaintiff's Collective Response to Defendant's Corrected Briefs, at 8-9). Warren does not dispute the government's explanation of the statutory definitions of the words "petroleum products" and "crude oil" or suggest that there is any error in the trial court's reliance on the government's explanation. And indeed, our review of the quoted paragraphs and authorities cited therein confirms that all "petroleum products" are indeed derived from "crude oil."

Thus, although, read alone, § 4611(a)(2) may appear to tax a product "because of its importation," when the provision as a whole is read, the tax is really imposed not because the product is imported, but *because it is a petroleum product.* There is no difference in scope between crude oil and petroleum products — they merely represent different stages of refining.

Therefore the ET does not discriminate against imports in the way *Texport* requires in order for a tax to be eligible for drawback, and the trial court's rejection of Warren's claims for drawback of ETs was correct.

Finally, while drawback for ET is arguably a question of first impression, we are unpersuaded it warrants en banc hearing. Even assuming it is of "exceptional importance," it is so analogous to HMT that *Texport* controls. Thus, it is not truly a "precedent-setting question," and as we have already explained, Warren's assertions of error in *Texport* are weak.

CONCLUSION

The Court of International Trade correctly exercised jurisdiction over this civil action contesting an on-the-merits denial of a drawback protest by Customs and properly applied this court's decision in *Texport* in sustaining that denial. Warren has shown no question that is precedent-setting or of exceptional importance or any question not correctly resolved by *Texport* and thus no justification for en banc hearing of this appeal. Under *Texport*, Warren's claim for HMT is absolutely foreclosed. Nor has Warren shown any error in

the trial court's application of the *Texport* rule to the protest claim for drawback of ETs. We hold simply: like the HMT, the ET is not imposed on cargo "because of . . . importation." On that basis, the trial court's decision upholding Customs' denial of Warren's drawback protest must be and is, hereby,

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED APRIL 30, 2002

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 97-07-01156

201 F. Supp. 2d 1366

GEORGE E. WARREN CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

JUDGE: R. KENTON MUSGRAVE, JUDGE.

OPINION: Plaintiff George E. Warren Corporation ("Warren") brings this action pursuant to 28 U.S.C. § 1581(a) seeking drawback of Harbor Maintenance Taxes ("HMTs")[1]

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1. The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub.L. No. 99-662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461.

and Environmental Taxes ("ETs")[2] incurred in connection with entries of unleaded gasoline in December, 1995 and motor fuel blending stock in January, 1996. In May and June, 1996 Warren exported similar merchandise, and on July 15, 1996 it filed drawback claims with Defendant the United States Customs Service ("Customs") pursuant to 19 U.S.C. § 1313(p), which provides for drawback based on substitution of finished petroleum derivatives. On its drawback request forms, the only dollar amounts Warren specifically claimed were attributable to "Column 1"[3] customs duties. Customs liquidated the drawback claims on October 4, 1996 and granted in-full the amounts claimed by Warren. Subsequently, Warren filed a timely protest challenging Customs' failure to also grant drawback of

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2. The ET was an excise tax on crude oil received at a United States refinery and petroleum products entered into the United States for consumption, use, or warehousing imposed pursuant to 26 U.S.C. § 4611. The tax rate was the sum of the Hazardous Substance Superfund financing rate, 9.7 cents a barrel, and the Oil Spill Liability Trust Fund financing rate, 5 cents a barrel. The Hazardous Substance Superfund tax was applicable during the period "after December 31, 1986 and before January 1, 1996" and the Oil Spill Liability Trust Fund tax was applicable during the period "after December 31, 1989 and before January 1, 1995." 26 U.S.C. §§ 4611(e)(1) and (f)(1). Recently, legislation was introduced to reinstate both taxes. *See* H.R. 4060, 107th Cong. (2d Sess.2002).

3. "Column 1 duties" are the duties imposed by the Harmonized Tariff Schedule of the United States ("HTSUS") based on the classification of the merchandise within the HTSUS. In this instance, the merchandise was classified under HTSUS 2710.00.15 as "unleaded gas motor fuel, other" or HTSUS 2710.00.18 as "motor fuel blending stock." The general Column 1 duty rate for both of these provisions is 52.5 cents a barrel.

the HMTs and ETs associated with the entries. The protest was denied by Customs on the ground that "[t]he Harbor Maintenance Tax (HMT) is an incidental expense incurred upon a vessel entering a harbor and, as such, is not refundable under drawback." Protest No. 5301-97-100054 at Section VI. Warren then filed the present action contesting the denial of its protest.

Presently before the Court are Customs' motion to dismiss and Warren's motion for summary judgment. Customs argues that this Court only has jurisdiction under 28 U.S.C. § 1581(a) where there has been a denial of a valid protest, and in this case Warren did not have grounds to file a protest since it did not request drawback of the HMTs and ETs in its original drawback claim. Alternatively, Defendant argues that this action should be dismissed for failure to state a claim upon which relief may be granted because the United States Court of Appeals for the Federal Circuit ("Federal Circuit") conclusively determined in *Texport v. United States,* 185 F.3d 1291 (1999), that the HMT is not eligible for drawback, and the Federal Circuit's reasoning in *Texport* should also bar drawback of the ET. Conversely, Warren argues that it is entitled to summary judgment because the Federal Circuit erred in its *Texport* decision, and both the HMT and ET should, as a matter of law, be eligible for drawback.

For the reasons which follow, the Court concludes that it has jurisdiction to decide the merits of this action. Because there is no issue of material fact and because Customs' alternative arguments address the substantive merits of Warren's complaint, the Court treats Customs' alternative arguments as a cross-motion for summary judgment pursuant to CIT Rule 56(b). The Court holds that the Federal Circuit's decision in *Texport* is controlling on the issue of whether the HMT is eligible for

drawback. Furthermore, the Court concludes that the ET lacks the requisite nexus with importation to make it eligible for drawback. Therefore, Warren's motion for summary judgment is denied and Customs' motion to dismiss is granted as a motion for summary judgment.

I. Jurisdiction

Title 28, section 1581(a) of the United States Code provides that the Court of International Trade "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest." In this action, it is undisputed that Warren filed a timely protest regarding drawback of the HMTs and ETs in question and Customs denied that protest on its merits. However, Customs argues that there was no actual "refusal to pay" a claim for drawback for Warren to protest because Customs paid in-full the amounts claimed by Warren on its drawback forms, and the protest was the first time Warren requested drawback of the HMTs and ETs. Defendant's Corrected Memorandum in Support of its Motion to Dismiss ("Def.'s Br.") at 6. Customs asserts that Warren's protest was merely an attempt to recover more drawback than it had initially requested. *Id.* Customs concludes that "[w]ithout a *bona fide* refusal to pay, there is no case or controversy and no basis for a protest that would confer jurisdiction upon this tribunal." *Id.*

Warren argues that its claim for drawback of the HMTs and ETs was implicit in its original drawback claim filed under 19 U.S.C. § 1313(p). Plaintiff's Response to Defendant's Motion to Dismiss ("Pl.'s Response to Def.'s Mot. to Dismiss") at 3-5.

Warren notes that under 19 U.S.C. § 1514[4] it "has the right to contest Customs' liquidation of its drawback entry, or its refusal to pay [a] claim for drawback, *including the legality of all orders and findings entering into the same.*" Pl.'s Response to Def.'s Mot. to Dismiss at 3 (emphasis added). Thus Warren contends that "[i]mplicit in Customs' grant of drawback of Column 1 customs duties is its decision not to pay drawback of the taxes and fees associated with the imported merchandise identified to the drawback claim." *Id.* (footnote omitted).

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4. 19 U.S.C. § 1514 provides that:

> (a) Finality of decisions; return of papers
>
> [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—
>
> * * *
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
>
> (6) the refusal to pay a claim for drawback;
>
> * * *
>
> shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade. . . .

Moreover, Warren notes that 19 U.S.C. § 1313(p)(4)(B) was amended by § 2420(d) of the Miscellaneous Trade and Technical Corrections Act of 1999, Pub.L. No. 106-36, 113 Stat. 127,178-79 (1999), and now provides that "[t]he amount of drawback payable under this subsection shall not exceed the amount of drawback that would be attributable to the article . . . had the claim qualified for drawback under subsection (j)." Subsection (j) of 19 U.S.C. § 1313 is broader than the unamended subsection (p) and specifically provides for drawback of duties, taxes, and fees paid on imported merchandise. The 1999 amendment was to have retroactive effect and provided importers six months to file drawback claims pursuant to the amended statute that would otherwise be barred by the three year statute of limitations. Pub.L. No. 106-36, § 2420(e), 113 Stat. 127, 179. Warren did not file another drawback claim, and it argues that it was not required to do so under the statute and had no reason to do so since Customs denied its first protest on its merits and the present action was already summonsed into this Court. *See* Plaintiff's Supplemental Brief ("Pl.'s Supplemental Br.") at 5-13.

The Court agrees with Warren. As a fundamental matter, this Court's jurisdiction over actions contesting the denial of a protest applies to all such appeals:[5] whether the claim is valid or not is a matter of law for this Court to decide. *See Swisher International, Inc. v. United States,* 205 F.3d 1358, 1364 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1036,

5. This Court views with considerable disapprobation the on going, unrelenting attacks by the Justice Department on the jurisdiction of the Court of International Trade and suggests that the administration of justice would be served better by diligent lawyering rather than by attempts to subvert the judicial review process.

148 L. Ed. 2d 533 (2000). In this instance, the dispositive question is whether Warren could have or should have explicitly claimed amounts of HMT and ET for drawback as a prerequisite for bringing this action. Although the parties dispute whether the customs regulations in effect in 1996 permitted Warren to make an express claim for drawback of the HMTs and ETs on its drawback claim forms, they agree that the 1999 amendments retroactively provided the right to raise this claim. Nevertheless, Customs contends that Warren should have filed a second drawback claim expressly for the HMT and ET amounts during the six month "sunset" period provided by the 1999 amendment. Defendant's Response to Plaintiff's Supplemental Brief ("Def.'s Response to Pl.'s Supplemental Br.") at 7. In light of the fact that Customs had already ruled on the merits of such a claim in denying Warren's protest, filing a second drawback claim would have been futile. Therefore, contrary to Customs' assertion, the Court finds that Warren has, in effect, exhausted its administrative remedies and concludes that this action presents an actual controversy fit for judicial review.

II. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

Appendix B

III. Drawback of Harbor Maintenance Taxes

In *Texport v. United States,* 185 F.3d 1291 (1999), the Federal Circuit found that 19 U.S.C. § 1313(j)(2) provides for drawback where "(1) the charge is 'any duty, tax, or fee assessed under Federal law'; and (2) the charge is assessed 'because of . . . importation.' "185 F.3d at 1296. Applying these two conditions to the HMT, the court held that:

> Condition (1) is plainly satisfied here, so the dispositive question is whether the HMT is assessed "because of . . . importation." 19 U.S.C. § 1313(j)(2). This language, we think, is best read as limiting the scope of the charges eligible for drawback to only those with a substantial nexus to the importation of merchandise. We thus read the "because of . . . importation" clause to require a nexus between the assessed charges and the act of importation, and therefore preclude the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports. . . .
>
> The HMT is a generalized Federal charge for the use of certain harbors. *See* 26 U.S.C. § 4461. It is intended to be assessed independently of whether the "port use" is for imports, exports, or other shipments; a shipment unloaded in Savannah is charged the same HMT whether its origin is San Francisco or Singapore. *See, e.g.,* 19 C.F.R. § 24.24(b)(1) (listing ports where HMT is assessed).

> Thus, it does not have the necessary nexus to the importation of goods to qualify it for drawback under section 1313(j)(2).

Id. at 1296-97.

In the present action, Warren argues that "the *Texport* decision is incorrect as a matter of fact and law, constitutes *dicta* and is inapplicable to the claims at bar." Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Pl.'s Br.") at 16. First, Warren argues that, contrary to the Federal Circuit's conclusion, "the HMT is inextricably linked to the process of importation." *Id.* In support of this assertion, Warren cites the Federal Circuit's finding in *United States Shoe Corp. v. United States,* 114 F.3d 1564 (Fed. Cir. 1997), *aff'd.,* 523 U.S. 360 (1998), that:

> In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A).

Pl.'s Br. at 16-17 (quoting 114 F.3d at 1575). Warren argues that it is inconsistent for the court to find that the HMT is imposed because of exportation, but not because of importation. *Id.* at 17. Therefore, Warren concludes that the *Texport* holding should not control in this action. *Id.*

Warren also argues that the Federal Circuit's reasoning in *Texport* is flawed because it incorrectly states that HMT on domestic shipments is the same as shipments from foreign countries. *Id.* Specifically, the court stated that "a shipment unloaded in Savannah is charged the same HMT whether its origin is San Francisco or Singapore," 185 F.3d at 1297, but Warren notes that the HMT for the shipment from San Francisco would be calculated based on the "standard commercial documentation" whereas the HMT for the shipment from Singapore would be calculated based on Customs' appraised value of the merchandise. Pl.'s Br. at 17. Therefore, Warren concludes, "the amount of HMT paid can, and in most cases will, differ" and "[t]o the extent that [the Federal Circuit's] holding that the HMT is not imposed because of importation is based upon this erroneous analysis, it should be disregarded as *dicta*." *Id.* at 18.

Warren's final argument is that the HMT should be treated as a duty, rather than a tax or fee, for purposes of determining whether it is eligible for drawback, and that as a duty it satisfies the statutory requirements. *Id.* at 18-26. Title 26, section 4462(f)(1) of the United States Code provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] . . . as if such tax were a customs duty." Warren asserts that "none of the applicable regulations provide that the HMT should not be treated as a duty;" thus it should be treated as a duty for all administrative and enforcement purposes. Pl.'s Br. at 19. As previously noted, in *Texport* the Federal Circuit held that drawback was available under 19 U.S.C. § 1313(j)(2) where "(1) the charge is 'any duty, tax, or fee assessed under Federal law'; and (2) the charge is

assessed 'because of . . . importation.' " 185 F.3d at 1296. Warren argues that the "because of . . . importation" requirement applies to taxes or fees, but not to duties, because duties, by their very nature, are imposed on imports. Pl.'s Br. at 25-26.

Warren also argues that drawback is an administrative and enforcement provision of the customs laws. In support of this proposition, Warren compares the language of 26 U.S.C. § 4462(f)(1), quoted *supra*, to 19 U.S.C. § 58c(g)(2), regarding the Merchandise Processing Fee ("MPF"), which states:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations, *other than those laws and regulations relating to drawback,* shall apply with respect to any fee prescribed under subsection (a) of this section . . . as if such fee is a customs duty.

Pl.'s Br. at 21 (quoting 19 U.S.C. § 58c(g)(2) (emphasis added)). Warren highlights the fact that the language of the MPF statute parallels the language of the HMT statute except that the MPF statute excludes "those laws and regulations relating to drawback" from "the administrative and enforcement provisions of customs laws." Pl.'s Br. at 21-22. Thus Warren concludes that, in the absence of an express exclusion, drawback is an administrative and enforcement provision of the customs laws. *Id.* at 23. Warren also notes that in *International Business Machines Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), the Federal Circuit held "that the phrase 'administrative and enforcement' . . . should

be read 'broadly.'" Plaintiff's Brief in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Pl.'s Reply Br.") at 7 (citing 201 F.3d at 1372).

Although Warren's arguments are interesting and well briefed, the Federal Circuit's holding in *Texport* that the HMT is not subject to drawback is, nevertheless, controlling on this issue. With respect to Warren's first two arguments, namely, that the HMT should logically have a substantial nexus to importation if it has one to exportation, and that the Federal Circuit erred, as a matter of law, in stating that the HMT is calculated in the same manner for foreign and domestic shipments, the doctrine of *stare decisis* leads this Court to follow the precedent of the Federal Circuit. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.02[2] (3d ed. 1997) ("The duty to follow the binding decisions of a higher authority does not depend on the correctness of those decisions."). Furthermore, regarding the Federal Circuit's statement that a foreign and domestic shipment, otherwise identical, would be charged the exact same amount of HMT, this Court concludes that the Federal Circuit's chief point in that section of its opinion was merely that the HMT is assessed on both imports and domestic shipments, not that it would be calculated in the same manner.

Texport and the plain meaning of 19 U.S.C. § 1313(j) are also dispositive of Warren's argument that the HMT should be treated as a duty instead of a tax for drawback purposes. Whether the HMT is regarded as a duty or a tax for determining its eligibility for drawback, and whether or

not drawback is an administrative or enforcement provision,[6] the plain language of the statute creating the right to drawback of duties, taxes and fees, 19 U.S.C. § 1313(j), requires that the duty, tax, or fee be "imposed under federal law because of its importation." In *Texport,* the Federal Circuit considered the mechanics of how the HMT is imposed and concluded that it does not have the requisite nexus with importation to qualify for drawback under § 1313(j).[7] 185 F.3d at 1297. More importantly, while 26 U.S.C. § 4462(f)(1) provides that the HMT should be treated *as if* it were duty for administration and enforcement purposes, the HMT remains, in essence, a tax. *See Citgo Petroleum Corporation v. United States,* 25 CIT __, 104 F. Supp. 2d 106, 107-108 (2000).

IV. Drawback of Environmental Taxes

Warren argues that it is entitled to drawback of the ETs incurred in connection with the subject entries because the ETs are imposed "because of . . . importation" as required by 19 U.S.C. § 1313(j) and have the specific "nexus with importation" required by *Texport* since they are imposed in a discriminatory manner against imports. Warren notes that 26 U.S.C. § 4611(a), provides that the taxes are imposed on

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6. Because the Court finds that the "because of . . . importation" requirement of 19 U.S.C. § 1313(j) applies to duties as well as taxes and fees, the Court does not reach the issue of whether drawback is an administrative or enforcement provision.

7. In 1998, Customs amended its regulations, and 19 C.F.R. § 191.3(b)(1) now states that the HMT is not subject to drawback. Since this regulation was promulgated after the present action was commenced, it does not apply in this instance.

"petroleum products *entered into the United States for consumption, use, or warehousing*." Pl.'s Br. at 12 (emphasis in brief). Warren argues that "the phrase 'entered into the United States' is synonymous with importation;" therefore the "because of . . . importation" requirement of 19 U.S.C. § 1313(j) is satisfied. *Id.* at 12- 13. Moreover, Warren argues that the ETs discriminate against imports because they apply to imported "petroleum products," but only domestic "crude oil." Plaintiff's Collective Response to Defendant's Corrected Briefs at 6. Therefore, Warren concludes that the ETs are distinguishable from the HMT, because they are not "assessed in a nondiscriminatory fashion against all shipments." *Id.* (quoting *Texport,* 185 F.3d at 1296).

Contrary to Warren's assertions, Customs argues that the ET, like the HMT, is not imposed because of importation, but is instead a generalized charge "to finance trust funds responsible for paying the cleanup costs for hazardous waste sites and oil spills" that is imposed in a nondiscriminatory manner on both imported petroleum products and domestic crude oil. Defendant's Corrected Memorandum in Support of its Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J.") at 10 (citing H.R. Rep. No. 96-1016, pt. 2, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151, 6153, and H.R. Rep. No. 99-727, at 204-05 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 3733-34.) Customs explains the nondiscriminatory application of the ETs, stating that:

> Pursuant to 26 U.S.C. § 4611(a) & (b), ETs are imposed on domestic crude oil received at U.S. refineries, on petroleum products imported

> into the United States, and on domestic crude oil used in the United States or exported, provided the tax had not been imposed previously. The term "crude oil" includes crude oil condensates and natural gasoline. 26 U.S.C. § 4612(a)(1). The term "petroleum product" includes crude oil. *Id.* § 4612(a)(3). The legislative history to these statutory provisions further explains that the oil subject to tax is "crude oil, including crude oil condensate and natural gasoline" and that "petroleum products" include "crude oil, crude oil condensate, natural and refined gasoline, refined and residual oil, *and any other hydrocarbon product derived from crude oil or natural gasoline . . .* " H.R. Rep. No. 96-1016, pt 2, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151 (emphasis added).
>
> Thus, contrary to Warren's claim that the ET leaves domestic petroleum products untaxed, the legislature recognized that domestic petroleum products would be "derived from crude oil or natural gasoline" that were [*sic*] already separately taxed. This reading of the legislative intent is further consistent with 26 U.S.C. § 4612(b), which assures that taxes are imposed only once on any petroleum product. *See* H.R. Rep. No. 96-1016, pt 2, at 5.

Defendant's Reply to Plaintiff's Collective Response to Defendant's Corrected Briefs at 8-9. Customs also asserts that it "had no role in collecting or imposing [the] ET" and "[t]he only

link between the ET and importation was the timing of when ET was incurred." Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. at 10-11. Thus, Customs concludes that the ETs have only a remote nexus to importation which does not satisfy the "because of . . . importation" requirement of 19 U.S.C. § 1313(j) as interpreted by *Texport.*

The Court finds that the ETs are not subject to drawback. As Customs' has explained, the ET is a generalized charge assessed against all petroleum products, which is imposed on domestic products prior to refinement and imported petroleum products regardless of their level of refinement at the time they are entered. Since the ET is imposed in a nondiscriminatory manner on both imported and domestic petroleum products, the Court concludes that, like the HMT, it does not have "the necessary nexus to importation to qualify it for drawback under [19 U.S.C. §] 1313(j)(2)." *Texport,* 185 F.3d at 1297.

V. Conclusion

For the foregoing reasons, Warren's motion for summary judgment is denied and Customs' motion to dismiss is granted as a cross-motion for summary judgment. Judgment shall enter accordingly.

R. KENTON MUSGRAVE, JUDGE

Decided: April 30, 2002, New York, New York

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DENYING PETITION FOR REHEARING FILED NOVEMBER 6, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 13, 2003.

FOR THE COURT

s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: November 6, 2003

APPENDIX D — STATUTES INVOLVED

26 U.S.C. § 4461. Imposition of tax.

(a) General rule. There is hereby imposed a tax on any port use.

(b) Amount of tax. The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.

(1) Liability. The tax imposed by subsection (a) shall be paid by—

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper

(2) Time of imposition. Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

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26 U.S.C. § 4462. Definitions and special rules.

(a) Definitions. For purposes of this subchapter—

(1) Port use. The term 'port use' means—

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

(2) Port.

(A) In general. The term 'port' means any channel or harbor (or component thereof) in the United States, which—

(i) is not an inland waterway, and

(ii) is open to public navigation.

(B) Exception for certain facilities. The term 'port' does not include any channel or harbor with respect to which no Federal funds have been used since 1977 for construction, maintenance, or operation, or which was deauthorized by Federal law before 1985.

(C) Special rule for Columbia River. The term 'port' shall include the channels of the Columbia River in the States of Oregon and Washington only up to the downstream side of Bonneville lock and dam.

(3) Commercial cargo.

(A) In general. The term 'commercial cargo' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included. The term 'commercial cargo' does not include—

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

(4) Commercial vessel.

(A) In general. The term 'commercial vessel' means any vessel used—

(i) in transporting cargo by water for compensation or hire, or

(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

(B) Exclusion of ferries.

(i) In general. The term 'commercial vessel' does not include any ferry engaged primarily in the ferrying of passengers (including their vehicles) between points within the United States, or between the United States and contiguous countries.

(ii) Ferry. The term 'ferry' means any vessel which arrives in the United States on a regular schedule during its operating season at intervals of at least once each business day.

(5) Value.

(A) In general. The term 'value' means, except as provided in regulations, the value of any commercial cargo as determined by standard commercial documentation.

(B) Transportation of passengers. In the case of the transportation of passengers for hire, the term 'value' means the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid.

* * *

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(f) Extension of provisions of law applicable to customs duty.

(1) In general. Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies. For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

(3) Administrative provisions applicable to tax law not to apply. The tax imposed by this subchapter shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes.

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(g) Special rules. Except as provided by regulations—

(1) Tax imposed only once. Only 1 tax shall be imposed under section 4461(a) with respect to the loading on and unloading from, or the unloading from and the loading on, the same vessel of the same cargo.

* * * *

26 U.S.C. § 4611. Imposition of tax.

(a) General rule. There is hereby imposed a tax at the rate specified in subsection (c) on—

(1) crude oil received at a United States refinery, and

(2) petroleum products entered into the United States for consumption, use, or warehousing.

(b) Tax on certain uses and exportation.

(1) In general. If—

(A) any domestic crude oil is used in or exported from the United States, and

(B) before such use or exportation, no tax was imposed on such crude oil under subsection (a),

then a tax at the rate specified in subsection (c) is hereby imposed on such crude oil.

(2) Exception for use on premises where produced. Paragraph (1) shall not apply to any use of crude oil for extracting oil or natural gas on the premises where such crude oil was produced.

(c) Rate of tax.

(1) In general. The rate of the taxes imposed by this section is the sum of—

(A) the Hazardous Substance Superfund financing rate, and

(B) the Oil Spill Liability Trust Fund financing rate.

(2) Rates. For purposes of paragraph (1)—

(A) the Hazardous Substance Superfund financing rate is 9.7 cents a barrel, and

(B) the Oil Spill Liability Trust Fund financing rate is 5 cents a barrel.

(d) Persons liable for tax.

(1) Crude oil received at refinery. The tax imposed by subsection (a)(1) shall be paid by the operator of the United States refinery.

(2) Imported petroleum product. The tax imposed by subsection (a)(2) shall be paid by the person entering the product for consumption, use, or warehousing.

(3) Tax on certain uses or exports. The tax imposed by subsection (b) shall be paid by the person using or exporting the crude oil, as the case may be.

* * * *

26 U.S.C. § 4612. Definitions and special rules.

(a) Definitions. For purposes of this subchapter—

(1) Crude oil. The term "crude oil" includes crude oil condensates and natural gasoline.

(2) Domestic crude oil. The term "domestic crude oil" means any crude oil produced from a well located in the United States.

(3) Petroleum product. The term "petroleum product" includes crude oil.

(4) United States.

(A) In general. The term "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, any possession of the United States, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(B) United States includes continental shelf areas. The principles of section 638 shall apply for purposes of the term "United States".

(C) United States includes foreign trade zones. The term "United States" includes any foreign trade zone of the United States.

(5) United States refinery. The term "United States refinery" means any facility in the United States at which crude oil is refined.

(6) Refineries which produce natural gasoline. In the case of any United States refinery which produces natural gasoline from natural gas, the gasoline so produced shall be treated as received at such refinery at the time so produced.

(7) Premises. The term "premises" has the same meaning as when used for purposes of determining gross income from the property under section 613.

(8) Barrel. The term "barrel" means 42 United States gallons.

(9) Fractional part of barrel. In the case of a fraction of a barrel, the tax imposed by section 4611 shall be the same fraction of the amount of such tax imposed on a whole barrel.

(b) Only 1 tax imposed with respect to any product. No tax shall be imposed by section 4611 with respect to any petroleum product if the person who would be liable for such tax establishes that a prior tax imposed by such section has been imposed with respect to such product.

* * * *

19 U.S.C. § 1313. Drawback and refunds

* * *

(j) Unused merchandise drawback.

(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—

(A) is, before the close of the 3-year period beginning on the date of importation—

(i) exported, or

(ii) destroyed under customs supervision; and

(B) is not used within the United States before such exportation or destruction; then upon such exportation or destruction 99 percent of the amount of each duty, tax, or fee so paid shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

(2) Subject to paragraph (4), if there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic), that—

(A) is commercially interchangeable with such imported merchandise;

(B) is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision; and

(C) before such exportation or destruction—

(i) is not used within the United States, and

(ii) is in the possession of, including ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback under this paragraph, if that party—

(I) is the importer of the imported merchandise, or

(II) received from the person who imported and paid any duty due on the imported merchandise a certificate of delivery transferring to the party the imported merchandise, commercially interchangeable merchandise, or any combination of imported and commercially interchangeable merchandise (and any such transferred merchandise, regardless of its origin, will be treated as the imported merchandise and any retained merchandise will be treated as domestic merchandise);

then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported

merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

(3) The performing of any operation or combination of operations (including, but not limited to, testing, cleaning, repacking, inspecting, sorting, refurbishing, freezing, blending, repairing, reworking, cutting, slitting, adjusting, replacing components, relabeling, disassembling, and unpacking), not amounting to manufacture or production for drawback purposes under the preceding provisions of this section on—

(A) the imported merchandise itself in cases to which paragraph (1) applies, or

(B) the commercially interchangeable merchandise in cases to which paragraph (2) applies,

shall not be treated as a use of that merchandise for purposes of applying paragraph (1)(B) or (2)(C).

(4)(A) Effective upon the entry into force of the North American Free Trade Agreement, the exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement

Implementation Act, of merchandise that is fungible with and substituted for imported merchandise, other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act, shall not constitute an exportation for purposes of paragraph (2).

(B) Beginning on January 1, 2015, the exportation to Chile of merchandise that is fungible with and substituted for imported merchandise, other than merchandise described in paragraphs (1) through (5) of section 203(a) of the United States-Chile Free Trade Agreement Implementation Act, shall not constitute an exportation for purposes of paragraph (2). The preceding sentence shall not be construed to permit the substitution of unused drawback under paragraph (2) of this subsection with respect to merchandise described in paragraph (2) of section 203(a) of the United States-Chile Free Trade Agreement Implementation Act.

* * *

Appendix D

(p) Substitution of finished petroleum derivatives.

(1) In general. Notwithstanding any other provision of this section, if—

(A) an article (hereafter referred to in this subsection as the "exported article") of the same kind and quality as a qualified article is exported;

(B) the requirements set forth in paragraph (2) are met; and

(C) a drawback claim is filed regarding the exported article; drawback shall be allowed as described in paragraph (4).

(2) Requirements. The requirements referred to in paragraph (1) are as follows:

(A) The exporter of the exported article—

(i) manufactured or produced a qualified article in a quantity equal to or greater than the quantity of the exported article,

(ii) purchased or exchanged, directly or indirectly, a qualified article from a manufacturer or producer described in subsection (a) or (b) in a quantity equal to or greater than the quantity of the exported article,

(iii) imported a qualified article in a quantity equal to or greater than the quantity of the exported article, or

(iv) purchased or exchanged, directly or indirectly, a qualified article from an importer in a quantity equal to or greater than the quantity of the exported article.

(B) In the case of the requirement described in subparagraph (A)(ii), the manufacturer or producer produced the qualified article in a quantity equal to or greater than the quantity of the exported article.

(C) In the case of the requirement of subparagraph (A)(i) or (A)(ii), the exported article is exported during the period that the qualified article described in subparagraph (A)(i) or (A)(ii) (whichever is applicable) is manufactured or produced, or within 180 days after the close of such period.

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(D) In the case of the requirement of subparagraph (A)(i) or (A)(ii), the specific petroleum refinery or production facility which made the qualified article concerned is identified.

(E) In the case of the requirement of subparagraph (A)(iii) or (A)(iv), the exported article is exported within 180 days after the date of entry of an imported qualified article described in subparagraph (A)(iii) or (A)(iv) (whichever is applicable).

(F) Except as otherwise specifically provided in this subsection, the drawback claimant complies with all requirements of this section, including providing certificates which establish the drawback eligibility of articles for which drawback is claimed.

(G) The manufacturer, producer, importer, transferor, exporter, and drawback claimant of the qualified article and the exported article maintain all records required by regulation.

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(3) Definition of qualified article, etc. For purposes of this subsection—

(A) The term "qualified article" means an article—

(i) described in—

(I) headings 2707, 2708, 2709.00, 2710, 2711, 2712, 2713, 2714, 2715, 2901, and 2902, and subheadings 2903.21.00, 2909.19.14, 2917.36, 2917.39.04, 2917.39.15, 2926.10.00, 3811.21.00, and 3811.90.00 of the Harmonized Tariff Schedule of the United States, or

(II) headings 3901 through 3914 of such Schedule (as such headings apply to the primary forms provided under Note 6 to chapter 39 of the Harmonized Tariff Schedule of the United States), and

(ii) which is—

(I) manufactured or produced as described in subsection (a) or (b) from crude petroleum or a petroleum derivative,

(II) imported duty-paid, or

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(III) an article of the same kind and quality as described in subparagraph (B), or any combination thereof, that is transferred, as so certified in a certificate of delivery or certificate of manufacture and delivery in a quantity not greater than the quantity of articles purchased or exchanged.

The transferred merchandise described in subclause (III), regardless of its origin, so designated on the certificate of delivery or certificate of manufacture and delivery shall be the qualified article for purposes of this section. A party who issues a certificate of delivery, or certificate of manufacture and delivery, shall also certify to the Commissioner of Customs that it has not, and will not, issue such certificates for a quantity greater than the amount eligible for drawback and that appropriate records will be maintained to demonstrate that fact.

(B) An article, including an imported, manufactured, substituted, or exported article, is of the same kind and quality as the qualified article for which it is substituted under this subsection if it is a product that is commercially interchangeable with or referred to under the same eight-digit classification of the

Harmonized Tariff Schedule of the United States as the qualified article. If an article is referred to under the same eight-digit classification of the Harmonized Tariff Schedule of the United States as the qualified article on January 1, 2000, then whether or not the article has been reclassified under another eight-digit classification after January 1, 2000, the article shall be deemed to be an article that is referred to under the same eight-digit classification of such Schedule as the qualified article for purposes of the preceding sentence.

(C) The term "drawback claimant" means the exporter of the exported article or the refiner, producer, or importer of either the qualified article or the exported article. Any person eligible to file a drawback claim under this subparagraph may designate another person to file such claim.

(4) Limitation on drawback. The amount of drawback payable under this subsection shall not exceed the amount of drawback that would be attributable to the article—

(A) manufactured or produced under subsection (a) or (b) by the manufacturer or producer described in clause (i) or (ii) of paragraph (2)(A), or

(B) imported under clause (iii) or (iv) of paragraph (2)(A) had the claim qualified for drawback under subsection (j).